FARAD CONTINUATION SHEET

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

APPELLATE SIDE,

NAGUR BENCH, NAGPUR.

DISTRICT:

Criminal Application No.2514/2005

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Office Note, Office Memoranda of Coram, appearance, Court's Orders or directors and registrar's orders

Court's or Judge's orders

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Coram : A.P.Lavande, J.
Dated : February 10, 2006

Heard Mr. Anup Dhore, learned counsel for the applicants and Mr. Loney, learned A.P.P. for the respondent.

By this application under Section 482 of the Code of Criminal Procedure, the applicants take exception to order dated 7/8/2005 passed by the Additional Sessions Judge, Pandharkawada in Sessions Trial No. 41/02 in which the applicants are accused.

It is the case of applicants that the prosecution filed an application dated 15/7/2005 under Section 311 of Criminal Procedure Code seeking issuance of summons to Shri S.R. Pande Nayab Nazar of Tahsil office, Yavatmal. It appears that the

prosecution wanted to prove dying declaration recorded by Shri P.D. Mahajan which was relied upon by the prosecution and since Shri Mahajan had expired, the prosecution wanted to prove the contents of dying declaration by examining Shri Pande who was conversant with handwriting of late Mahajan. This application was moved after the prosecution had closed its case. The application was allowed by order dated 7/8/2005 which is impugned in the present application.

Mr. Dhore submitted that the applicants are facing trial from the year 1995 and therefore, learned Additional Sessions Judge committed gross illegality in passing impugned order which has caused serious prejudice to the applicant. It is further submitted that in order to fill up the lacuna in the prosecution case, the said application has been filed by the prosecution. According to learned counsel, learned Additional Sessions Judge ought not to have allowed the said application since the order was passed contrary to import of Section 311 of Code of the Criminal Procedure.

Per contra, Mr. Loney submitted that jurisdiction exercised by learned Additional

Sessions Judge has been correctly exercised and according to him, the application could have been moved at any stage of the case. According to Mr. Loney examination of Mr. Pande was essential for just decision of the case. In support of his submission, Mr. Loney has placed reliance upon the judgment of the Apex Court reported in AIR 1991 Supreme Court 1346 Mohanlal Shamji Soni Vs. Union of India and another.

I have considered the submissions made by the learned counsel for both sides. In catena of decisions of the Apex Court, the Apex Court has held that the power under Section 311 of the Code of Criminal Procedure has to be liberally exercised and if examination of any person is essential for just decision of the case, examination of such person must be allowed even at the later stage of the case. No doubt, if a witness is permitted to be examined at a later stage, needless to mention that opportunity must be given to other side to cross-examine. In the present case learned Additional Sessions Judge has permitted the prosecution to examine Mr. Pande to prove the contents of dying declaration recorded by the Executive

Magistrate Shri P.D. Mahajan who had expired. No doubt, the application has been filed after the prosecution closed its case. But, that by itself, cannot be sufficient to hold that the learned Additional Sessions Judge has permitted to fill up the lacuna in the prosecution case. The defence will be entitled to avail the opportunity to cross-examine Mr. Pande when he is examined.

In my opinion, jurisdiction exercised by the Trial Court cannot be said to be illegal warranting exercise of jurisdiction under Section 482 of the Code of Criminal Procedure. I do not find any illegality or perversity in the impugned order passed. On the contrary, the impugned order has been passed in order to arrive at just decision in the case. Therefore, I do not find any merit in this application and the same is rejected.

The application stands disposed of.

JUDGE

A.